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Supreme Court, U.S.
FILED
APR 10 1996
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No. 95-1449

In The

Supreme Court of the United States

October Term, 1995

OWENS-CORNING FIBERGLAS CORPORATION,

Petitioner,

vs.

CLARENCE DUDLEY and GEORGIANNA DUDLEY,

Respondents.

On Petition for a Writ of Certiorari to the District Court of Appeal, Second District of Florida

RESPONDENTS' BRIEF IN OPPOSITION

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APPENDIX

Appendix A — Excerpted Transcript of Proceedings Dated May 16, 1995 ..... 1a

Appendix B — Exhibits 28a

Respondents request that the Court deny the petition for writ of certiorari seeking review of an opinion of the Second District Court of Appeal of the State of Florida.

STATEMENT OF JURISDICTION

This Court cannot properly exercise jurisdiction over this case pursuant to 28 U.S.C. § 1257(a). The rulings by the trial court and their affirmance by the appellate court did not involve the resolution of a federal question.

STATEMENT OF THE CASE

I. Misstatements and Omissions of Proceedings in the Trial Court

Contrary to OCF's contention, the trial court did not deny its motion to strike punitive damages. The truth is that OCF never requested that the motion be heard.[1] OCF did not move for a directed verdict on the grounds that an award of punitive damages in this case would violate the Constitution. Rather, OCF's entire motion for directed verdict was simply:

> Your Honor, I would like the record to reflect the motions at this close of the plaintiffs' proof and at the close of all of the proof for a directed verdict on behalf of the defendant.[2]

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1. Obviously, there is no citation to the negative that the motion to strike was not called up for hearing. However, upon the request of the Court, Respondent will furnish the entire record below a review of which will document that at no time was any such motion presented to the trial court for a ruling. Respondent invites OCF to point out any such ruling in its reply to this brief in opposition.

2. (T-1177). Where appropriate respondent will cite to the trial (Cont'd)

OCF neglects to inform this Court that at the jury charge conference, the Dudleys requested that the trial court charge the jury in accordance with Florida's standard jury instruction on punitive damages,[3] and that OCF's response to this request was, "No objection".[4]

The record is absolutely clear that prior to the verdict being rendered in this case, OCF never once presented to the trial court any constitutional challenge to the Dudleys' punitive damage claim.[5] The first time OCF constitutionally challenged the punitive damages sought in this case was after the jury returned its verdict. These arguments were presented in OCF's post-trial motion.

OCF is correct that it sought a remittitur of the punitive award in its post-trial motion. OCF's motion was silent as to what OCF believed was an appropriate remittitur.[6] However, at the hearing on the post-trial motion, OCF specifically requested that the punitive award be remitted to $8.25 million.[7] When the

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(Cont'd)
transcript by indicating (T-). References to the record on appeal not in the form of transcripts will be indicated by (R-). Excerpts from the proceedings which appear in the appendix shall also be designed by (A-).

3. (T-1203).

4. *Id.*

5. Respondent will at the Court's request furnish the entire record so that the truth of this negative can be established. Respondent invites OCF to point out in its reply to this brief any such contention.

6. The post-trial motion is reprinted at pages 5a-13a of the Petition.

7. OCF's counsel stated at the hearing as follows:

(Cont'd)

trial judge ruled on the post-trial motion, he clearly stated that he was remitting the punitive award to the amount requested by Ms. Hill, OCF's lawyer.[8] When the trial court announced its intention to so remit the punitive verdict OCF silently consented.[9]

II. Misstatements or Omissions of the Facts

It is important to remember in this case that Mr. Dudley was first exposed to OCF's Kaylo product in 1972. This is significant because of the events which occurred in that year.

In January, 1972, OCF recognized that OSHA asbestos regulations were to become effective in July, 1972.[10] According to OCF, these regulations would make it much more difficult to

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(Cont'd)

> I think that it is just another point indicating that the punitive damage award must be based on Clarence Dudley's compensatory damages and not on anyone elses, and, Your Honor, that would mean that the cap in this particular case for three times the compensatories to Mr. Dudley would come out to be eight million, two hundred fifty thousand dollars, and it would be that number, although Owens-Corning does not admit that punitive damages should have been awarded in this case, but if they stand *it is our position that they should be reduced to that number.*

(Emphasis supplied) (A-8a).

8. (A-24a-25a).

9. *Id.*

10. (R-1269-70) (A-28a).

sell asbestos containing Kaylo insulation.[11] This was because other manufacturers were producing asbestos free insulation,[12] and customers were beginning to demand an asbestos free product.[13] In response to this problem, OCF directed in 1972 that a major emphasis be placed on the development of asbestos free Kaylo.[14] Interestingly, asbestos free Kaylo was perfected within days of the effective date of the OSHA asbestos regulations.[15]

The development of asbestos free Kaylo in July, 1972, presented OCF with two new questions. First, what was OCF going to do with its stockpile of old asbestos containing Kaylo? OCF decided that rather than destroy its stockpile it would "exert maximum pressure" to sell the old Kaylo.[16]

The second question confronted by OCF was what to do with the asbestos containing dust it had collected in the manufacturing of the old Kaylo. OCF began collecting five tons of Kaylo dust per day back in the late 1950's.[17] It had been adding that asbestos containing dust (*i.e.*, offware) as an ingredient to the old Kaylo.[18] OCF decided in 1972 that rather than waste the

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11. (R-1245) (A-30a).

12. (R-1248) (A-33a).

13. (R-1245) (A-30a).

14. *Id.*

15. (R-1271).

16. (R-1275) (A-34a-35a).

17. (R-1194) (A-37a-38a).

18. (R-1258).

asbestos containing dust, it would include that dust (offware) in the new asbestos free product.[19] By doing this OCF created a new problem, that is, the new asbestos free product was contaminated with asbestos dust from the old product. OCF next faced the question of what it would tell customers about the presence of asbestos in the new product.

On July 25, 1972, a meeting was held at OCF and a plan was developed as to what it should tell customers about the contamination of its new Kaylo.[20] The plan was to refrain from calling the new product asbestos free and instead to designate it as "AF" Kaylo.[21] The plan then called for customers to be told that the new Kaylo did not use asbestos as a reinforcing agent.[22] Despite the fact that OCF knew that claiming the "AF" Kaylo to be asbestos free would mislead workers,[23] they did it anyway. A notice was placed in the cartons which claimed that the product was "asbestos free" and that asbestos was no longer used as a reinforcing agent.[24]

All this was taking place during a time that OCF clearly appreciated the dangers presented by the presence of asbestos in products like Kaylo. In 1972, Dr. Jon Konsen, an OCF employee, wrote a memorandum concerning the health hazards of asbestos and the means of preventing that hazard.[25] Dr. Konsen explained

19. (R-1278) (A-36a).

20. (R-1272, 1278) (A-41a, 36a).

21. (R-1278) (A-36a).

22. (R-1272) (A-41a).

23. (R-1278) (A-36a).

24. (R-1285) (A-42a).

25. (R-1023) (A-43a-44a).

that asbestos dust was known to cause mesothelioma, the type of cancer Mr. Dudley developed.[26] He further explained that respirators (that OCF was recommending that workers wear when using the old Kaylo) were a poor choice for the protection of the workers.[27] According to Dr. Konsen, the inadequate protection afforded by respirators was one of the reasons that asbestos free Kaylo was developed.[28] Apparently, Dr. Konsen was unaware that during 1972, OCF was contaminating the asbestos free Kaylo with the asbestos dust from the old Kaylo, and that it was continuing to sell its stockpile of the old Kaylo with the instruction to wear the ineffective respirator.

These were the events that the evidence showed were taking place at OCF in 1972, when Mr. Dudley was first exposed to their product.

REASONS FOR DENYING THE WRIT

I.

THIS COURT LACKS JURISDICTION.

OCF seeks by its Petition to invoke the jurisdiction of this Court embodied in 28 U.S.C. §1257(a). OCF has not and can not discharge its burden to establish that the district court of appeal decided a federal question. The opinion of the district court of appeal was one word, "Affirmed".[29] Since the opinion of the

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26. *Id.*

27. *Id.*

28. *Id.*

29. The Court "would not ordinarily expect an appellate court . . . to remain silent on a constitutional issue requiring decision in the case before it." *Chambers v. Mississippi*, 401 U.S. 284, 303 (1972) (White, J., concurring opinion).

appellate court did not expressly pass upon a federal question, this Court will assume that the decision was due to want of proper presentation in the state court unless OCF can affirmatively show the contrary. *Street v. New York*, 394 U.S. 576 (1969). Here, such a showing can not be made by OCF because there is an independent and adequate state ground for the affirmance by the appellate court.

The state ground which justifies the affirmance of the punitive judgment in this case was that OCF did not preserve for appeal any constitutional challenge to the award of punitive damages.[30] OCF did not move to dismiss the punitive damage claim in the Dudleys' Complaint. OCF did move to strike the claim for punitive damages, but elected for tactical reasons not to have the trial court rule on that motion. In Florida, the failure of a party to secure a ruling on a motion is fatal to any appeal based upon that motion. *Sroczyk v. Fritz*, 220 So.2d 908 (Fla. 1969); *Coffman v. Kelly*, 256 So.2d 79 (Fla. 1st DCA 1972). At no time prior to the trial of this case did OCF request the trial court to in any way limit the Dudleys' punitive damage claim.

At the conclusion of all of the evidence, OCF moved for a directed verdict, but failed to state any grounds for that motion. Because no constitutional argument was made by OCF during the trial court's consideration of the motion for directed verdict, those arguments could not be considered by the trial court in its ruling on that motion or by the appellate court in its review of that ruling. Rule 1.480(a) Florida Rules of Civil Procedure[31]; *Local Mortgage Company of Georgia v. Powell*, 420 So.2d 311 (Fla. 1st DCA 1982); *Wagner v. Nottingham Association*, 464 So.2d 166 (Fla. 3rd DCA 1985), *cert. denied*, 475 So.2d 695 (1985).

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30. The undersigned orally argued to the court of appeal that OCF had not preserved its constitutional challenge to the punitive damage award.

31. Rule 1.480(a) provides that "A motion for a directed verdict shall state the specific grounds therefor."

OCF did not object to the trial court giving the Florida standard jury instruction on the issue of punitive damages. Since OCF did not object, OCF could not assign any error (constitutional or otherwise) in the appellate court to the giving of the punitive damage instruction. Rule 1.470(b) Florida Rules of Civil Procedure;[32] *State v. Anderson*, 639 So.2d 609 (Fla. 1994); *Craig v. State*, 510 So.2d 857 (Fla. 1987), *cert. denied*, 484 U.S. 1020 (1988).

The record demonstrates that at no time prior to the return of the verdict in this case did OCF ever raise for the trial court's consideration any constitutional issue concerning punitive damages. This had the tactical advantage for OCF of attempting to obtain a favorable verdict from the jury on the issue of punitive damages which would be virtually unassailable on appeal by the Dudleys. This tactic did not work and the jury returned a substantial punitive damage verdict.

In its post-trial motion, OCF sought to have the trial court determine that it was entitled to a judgment notwithstanding the verdict as to punitive damages or a remittitur of the punitive award.[33] In paragraph 4 of its post-trial motion, OCF requested a judgment notwithstanding the verdict because it contended that the trial court erroneously denied OCF's motion to strike punitive damages. The trial court's denial of this aspect of the post-trial motion did not involve a federal question, but rather, was justified because OCF had elected to not have that motion ruled upon. *Coffman, supra.* Affirmance of this ruling was justified because the trial court was correct in refusing to set aside the verdict based upon an alleged error that it did not commit. *Coffman, supra.*

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32. Rule 1.470(b) provides that "No party may assign as error the giving of any charge unless that party objects thereto at such time. . . ."

33. The post-trial motion is reprinted on pages 5a-13a of the petition.

In paragraph 13 of its post-trial motion, OCF sought an unspecified remittitur of the punitive verdict. At the hearing held on the post-trial motion, OCF clarified that it was seeking a remittitur of the $15 million punitive award to $8.25 million. OCF's counsel could not have been clearer in her request:

> It is our position that they should be reduced to that number [$8.25 million].[34]

When the trial court granted OCF's requested remittitur OCF silently consented. Florida does not permit a party to appeal from a ruling in its favor, *Held v. Held*, 617 So.2d 358 (Fla. 4th DCA 1993), or one rendered with its consent. *Cannon Sand and Rock, Inc. v. Maule Industries, Inc.*, 203 So.2d 636 (Fla. 3rd DCA 1967). Thus, to the extent that OCF requested the appellate court to hold that the trial court was constitutionally required to further remit the verdict, its refusal to do was justified based upon Florida law and did not require consideration of any federal question.

OCF may reply that the remittitur to $8.25 million was based upon Florida Statute § 768.73 and was not a constitutional remittitur. That may be true, however, the important point is that OCF did not in its post-trial motion or the hearing on that motion request a constitutional remittitur below $8.25 million. In short, OCF got the remittitur it asked for and for that reason could not successfully challenge the remittitur under Florida law.

In paragraph 14, of the post-trial motion, OCF claims that it was denied a constitutional right of access to the courts. That issue was never presented to the district court of appeal and thus was not ruled upon by the state's "highest court". As such, this issue can not provide a basis for the jurisdiction of this court.

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34. (A-8a).

In paragraph 15 of its post-trial motion, OCF sought a judgment notwithstanding the verdict concerning the punitive damage award. That paragraph alleged that the imposition of any punitive damages under the facts presented at trial was constitutionally impermissible. The resolution of this issue does not turn on a federal question. In Florida, a party may not seek a judgment notwithstanding the verdict on a ground that was not raised in a motion for directed verdict.[35] *General Dynamics Corp. v. Wright Airlines, Inc.*, 470 So.2d 788 (Fla. 3rd DCA 1985); *Dean Witter Reynolds, Inc. v. Hammock*, 489 So.2d 761 (Fla. 1st DCA 1986). As noted above, OCF did not seek a directed verdict based upon the unconstitutionality of a punitive award under the facts in this case. Thus, affirmance of the trial court's denial of this aspect of the post-trial motion did not require resolution of a federal question, but rather, is easily explainable based upon Florida procedural law.

In paragraph 16, OCF sought a judgment notwithstanding the verdict based upon its claim that any award of punitive damages in this case violated the Eighth Amendment. No such ground was raised by OCF in its motion for directed verdict, and for the same reasons discussed as to paragraph 15, the resolution of this issue in the trial and appellate court did not require consideration of a federal question.

In summary, OCF for tactical reasons decided that it did not wish to present any constitutional argument regarding the appropriateness of the Dudleys' punitive damage claim prior to the jury's verdict. After the verdict was rendered, OCF requested and received a remittitur of the punitive award from $15 million to $8.25 million. Affirmance of the punitive judgment in this

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35. Technically, Florida does not recognize a motion notwithstanding the verdict, rather in Florida the appropriate motion is a motion in accordance with the motion for a directed verdict. Rule 1.480(b) Florida Rules of Civil Procedure.

case was justified solely on the basis of Florida law and did not require the district court of appeal to decide any federal question.[36] For this reason, the jurisdiction of this Court does not exist pursuant to 28 U.S.C. §1257(a).

II.

THERE IS NO JURISPRUDENCE TO SUGGEST THAT THE AWARD OF PUNITIVE DAMAGES IN THIS CASE VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

A. Introduction

The Due Process Clause of the Fourteenth Amendment has been held to require that states provide procedural safeguards for the imposition of punitive damages.[37] The Court has suggested that substantive due process provides some limit on the size of punitive damage awards.[38] Florida clearly provides a defendant with procedural due process under a sophisticated statutory procedure requiring trial and appellate review of punitive damage awards.[39] OCF does not challenge the punitive award in

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36. To exercise jurisdiction pursuant to 28 U.S.C. § 1257, the record should at a minimum demonstrate that the federal question was presented in a timely manner under state law. *Webb v. Webb*, 451 U.S. 493, 501 (1981).

37. *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

38. *Id.* However, Justices Scalia and Thomas rejected the existence of a substantive due process right that punitive damages be reasonable, *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2726 (Scalia, J., concurring in judgment); Justice Kennedy has stated that the Constitution "does not concern itself with dollar amounts. . . ." 113 S. Ct. 2711, 2724 (Kennedy, J., concurring in judgment).

39. Fla. Stat. § 768.73.

this case on the grounds that it violated procedural due process. Rather, OCF claims that the punitive judgment in this case violates substantive due process. Since the remitted award in this case was upheld by the trial judge and unanimously affirmed on appeal it is entitled to a strong presumption of validity.[40] OCF's petition fails to demonstrate any reason to believe that this presumption has been overcome in this case.

B. The Mere Size of the Award.

In *TXO, supra*, this Court held that a $10 million punitive award did not violate due process. Thus, the mere size of the remitted punitive award in this case does not overcome the presumption of the validity of the award.

C. The Ratio Between Compensatory and Punitive Damages

In this case, the punitive judgment was slightly more than twice that of the compensatory award. This Court held in *TXO* that a punitive award 526 times greater than the compensatory damage award did not violate due process. In *Haslip*, the Court held that a punitive award four times the compensatory award did not violate due process. Moreover, despite the fact that for decades statutory punishments of treble damages have existed,[41] no decision has been found where any court has suggested that punishment of three times the actual damages violates substantive due process. There simply is no jurisprudence to suggest that the ratio between the actual damages and punitive

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40. *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993).

41. For instance, treble damages are permitted in patent infringement cases, 35 U.S.C. § 284; cases involving misrepresentation of Indian produced goods, 25 U.S.C. § 305e; certain consumer credit violations, 15 U.S.C. § 1693f, and anti-trust violations, 15 U.S.C. § 15.

damages in this case overcomes the presumption of the punitive award's validity.

D. Industry Custom

OCF claims that the punitive judgment in this case violated substantive due process because OCF complied with industry custom. OCF fails to direct the Court to any case which suggests that industry custom should be considered in a substantive due process analysis of punitive damages. More importantly, OCF did not comply with industry custom in 1972 when the exposure to its product Kaylo occurred in this case.

In 1972, the industry custom was to sell insulation which did not contain asbestos.[42] OCF violated this custom by continuing to sell asbestos containing insulation (Kaylo) in 1972.[43] In fact, in 1972, OCF continued to sell its stockpile of asbestos containing Kaylo even after it had developed an asbestos free version of the product.[44] The evidence in this case simply fails to support OCF's bald assertion that it complied with industry custom in the 1972 marketing of its product Kaylo. Therefore, contrary to the assertion by OCF, compliance with industry custom does not provide a reason for this Court to review the punitive award in this case.

E. Compliance with the ACGIH TLV

OCF claims that in 1972, it complied with the American Conference of Governmental Industrial Hygienists (ACGIH) threshold limit values (TLV) for asbestos. OCF neglects to tell this Court that the ACGIH clearly advised manufacturers that the

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42. (R-1248).

43. (R-1275).

44. *Id.*

TLV for asbestos was based upon exposure to chrysotile asbestos solely for the prevention of the disease asbestosis.[45] This is important because Kaylo contained predominately amosite asbestos,[46] a much more potent carcinogen for production of mesothelioma than chrysotile asbestos.[47] By 1972, OCF also knew that unlike the disease asbestosis, very low levels of exposure could cause the deadly cancer mesothelioma.[48] The evidence in this case clearly demonstrated that by 1972, OCF knew that the ACGIH recommendation for prevention of asbestosis by chrysotile asbestos was not intended and did not protect workers exposed to asbestos containing Kaylo from developing mesothelioma. Thus, the ACGIH TLV for chrysotile asbestos does not warrant this Court's review of the remitted punitive award in this case.

F. Compliance with Government Regulations

OCF claims that the punitive award in this case warrants review because in 1972, it complied with government regulations in the production and marketing of its Kaylo product. As will be shown below, OCF did not comply with any government regulations in 1972.

1. *OSHA Regulations*

One of the government regulations with which OCF claims it complied was the OSHA asbestos safety standards. In 1972, OSHA required that asbestos products such as Kaylo be accompanied by a warning. Rather than comply with OSHA

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45. (T-1133-4).

46. (R-993).

47. (T-1134-5).

48. (R-990-1).

warning regulations concerning asbestos products, OCF misled workers in 1972 by telling them that the new product did not contain asbestos.[49] Thus, while OCF may have complied with the OSHA warning regulations as to its old Kaylo, it did not do so in 1972 as to its new Kaylo.

Moreover, in 1972, OCF knew that the precautions that it was recommending for its old asbestos containing Kaylo, were unlikely to prevent mesothelioma, the cancer Mr. Dudley developed.[50] Dr. Konsen, OCF's medical consultant told OCF in 1972 that those precautions were inadequate and that asbestos disease could only be effectively prevented by removal of asbestos from the product.[51]

2. *Florida Regulations*

OCF claims that it complied with Florida regulations in the sale and production of Kaylo. The only Florida regulation referred to by OCF is the one that adopted the TLV suggested by the ACGIH. Respondent has already demonstrated why the ACGIH TLV recommendations were not relevant to and not relied upon by OCF in 1972. The same also applies to the adoption of those TLV's by the State of Florida.

There are additional reasons why the Florida regulations do not form a basis for finding that the punitive award in this case violates due process. The Florida regulations were not directed to manufacturers such as OCF. Rather, these regulations were directed to employers who used products such as Kaylo. In 1972, by telling its customers, the employers, that its new Kaylo

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49. (R-1285).

50. (R-1023).

51. *Id.*

no longer contained asbestos as a reinforcing agent, OCF deceived the employers into believing that the new Kaylo was asbestos free. This virtually guaranteed that employers in Florida when using new Kaylo would not comply with the asbestos safety practices prescribed by the Florida regulations. Since the evidence showed that OCF did not comply with any Florida regulations, its claim to the contrary can not provide a basis to find that the punitive award in this case violated due process.

In summary, OCF's alleged compliance with government regulations does not warrant review of the punitive award in this case.

G. Prior Punitive Awards

OCF contends that it has been the subject of $70 million[52] in prior punitive damage verdicts arising out of the same conduct that gave rise to the punitive award in this case. OCF urges the Court to take the prior punitive damage awards into consideration in evaluating whether the punitive judgment in this case violates OCF's right to due process. For several reasons the prior punitive awards against OCF do not render the punitive judgment in this case violative of the Due Process Clause and their existence does not warrant this Court's consideration of this case.

First, OCF has failed to demonstrate that it has ever had a punitive damage verdict rendered against it for the conduct demonstrated in this case. The case at bar presented a very unusual factual situation in asbestos litigation. While the vast

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52. This number has very little meaning because it includes verdicts that were subsequently settled and verdicts on appeal which may be settled or reversed. *See Dunn v. HOVIC*, 1 F.3d 1371 (3rd Cir.), *cert. denied*, 114 S. Ct. 650 (1993).

majority of asbestos cases involve the non-cancerous disease asbestosis, this case involved the malignant disease mesothelioma. Traditionally, punitive awards against OCF have involved persons exposed to Kaylo in the 1950's and/or 1960's. In this case, Mr. Dudley was first exposed to Kaylo in 1972. The conduct of OCF in 1972 was very different from its conduct prior to that time. OCF's conduct during the 1950's and 1960's involved its failure to adequately warn of health hazards associated with its Kaylo product. OCF did not in the 1960's have available asbestos free Kaylo which it contaminated with old Kaylo asbestos dust and it did not in the 1960's deceive the workers into believing Kaylo was asbestos free. Also, in the 1960's, OCF did not elect to maximize its profit by selling a stockpile of asbestos containing Kaylo when it had available an asbestos free Kaylo. Respondent challenges OCF to identify a single instance where the 1972 conduct proven in this case resulted in the payment of punitive damages.

The evidence in this case demonstrates that OCF's conduct in 1972 was much worse than OCF's conduct in the 1950's and 1960's. OCF has never paid a dollar in punitive damages for this conduct. The prior punitive awards against OCF for different conduct are irrelevant to the due process challenge by OCF in this case, and do not provide a reason to review this punitive judgment.

H. The Potential for Future Punitive Awards

OCF argues that since its conduct in 1972 may kill or maim many people who may seek punitive damages, the Court should find that the punitive judgment in this case violates the Due Process Clause. For several reasons this argument does not justify review by this Court.

First, the mere potential for future punitive awards arising

out of OCF's 1972 conduct is speculative at best. OCF's suggestion that the constitutional limitation on the judgment in this case should be determined by asking the rhetorical question: "If every other plaintiff recovered the same amount of punitive damages, would the resulting punishment be excessive?", is far too speculative upon which to bottom a constitutional standard. No one can possibly predict how many future plaintiffs there will be who are killed or maimed by OCF's 1972 conduct. Without knowing the number of future plaintiffs killed or injured by OCF's 1972 conduct, the Court can not possibly answer the rhetorical question suggested by OCF.[53]

Another reason that this argument by OCF does not warrant review in this Court is because juries who in the future are asked to evaluate OCF's 1972 conduct can consider the punitive award rendered in this case. Nothing prevents OCF from introducing evidence of prior punitive awards (i.e. this award) in future cases arising out of its 1972 conduct.[54] The lower courts and this Court, if necessary, can then determine if the future awards based upon OCF's 1972 conduct are excessive when considered in light of the award in this case. This approach avoids the gross speculation inherent in OCF's suggestion that this Court attempt to predict the number of future plaintiffs. The mere possibility of some unknown number of future punitive awards for an unknown amount does not warrant review of this case.

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53. The situation here is very different from the one in *BMW of North America v. Gore*, No. 94-896, because in that case the harm had already occurred and the number of potential future plaintiffs could be determined with mathematical certainty. Here, the extent of the harm is unknown, that is, no one knows how many people will ultimately be injured by this conduct.

54. *Johns-Manville Sales Corp. v. Janssens*, 463 So.2d 242 (Fla. 1st DCA 1984) *cert. denied*, 467 So.2d 999 (1985).

I. The Issues Presented in this Case Are Unlike Those Presented in *BMW.*

OCF argues that this case warrants review because the issues presented here are the same as those presented in *BMW of North America, Inc., v. Gore,* No. 94-896 (argued October 11, 1995). There are no similarities between this case and *BMW* which warrant review of the case at bar.

The misconduct of *BMW* pales in comparison to that of OCF. *BMW* did not disclose that it had repainted a car. OCF unnecessarily and knowingly exposed Mr. Dudley to a powerful carcinogen to avoid wasting asbestos dust that it had collected, and to avoid losing the profit on its stockpile of asbestos containing Kaylo. The injury suffered by Dr. Gore in *BMW* was at most a 10% reduction in the value of his car. Mr. and Mrs. Dudley, on the other hand, have had to slowly watch the progression of Mr. Dudley's terminal cancer caused by OCF's conduct.

The compensatory damages in *BMW* are minuscule compared to those in this case. In *BMW*, the compensatory award was Four Thousand Dollars while in this case, it was $4.26 million. The remitted punitive award in *BMW* is a staggering 500 times the actual damages. While in this case, the remitted punitive damages are only slightly more than twice the actual damages.

As OCF points out, *BMW* adhered to industry custom in not telling Dr. Gore that the car had been repainted. In this case, as shown above, OCF did not adhere to industry custom when it sold asbestos containing Kaylo in 1972.

As OCF points out, *BMW* complied with statutory disclosure standards, while in this case, as shown above, OCF

did not comply with statutory disclosure standards. Rather, OCF deceived workers into believing that its new Kaylo in 1972 did not contain asbestos. This was in direct violation of the statutory disclosure standards required by OSHA.

Another difference between *BMW* and this case is that the potential future plaintiffs could be calculated with mathematical certainty in *BMW*. In this case, no one can determine how many workers will get cancer in the future as a result of OCF's 1972 conduct. Thus, if the appropriate question in *BMW* is as suggested by OCF: "If every other plaintiff recovered the same amount of punitive damages would the resulting punishment be excessive?", that is not appropriate here.

Contrary to OCF's contention, a favorable decision in *BMW* should not have an impact on this case. Whatever due process limits may be placed on punitive damages in *BMW* they would not render the award in this case violative of due process. Therefore, there is no need to grant *certiorari* in this case to await the Court's decision in *BMW*.

J. The Lower State and Federal Courts Are Divided Over the Standards to Be Applied in Reviewing Punitive Damage Awards.

OCF argues that *certiorari* should be granted in this case because state and federal courts continue to apply inconsistent standards in reviewing the size of punitive damage verdicts. The fact that different states take different approaches to the availability and size of punitive damage awards is no reason for this Court to grant certiorari. States have every right to approach the issue of punitive damages differently. What is required of the state courts, and federal courts applying state law, is not uniformity in their approach to punitive damages, but only that the approach they choose is not unconstitutional.

To bolster its inconsistent argument, OCF claims that the decision in this case is directly in conflict with the decision of the Third Circuit in *Dunn v. HOVIC*, 1 F.3d 1371 (3rd Cir.), *cert. denied*, 114 S. Ct. 650 (1993). There is no conflict between *Dunn* and this case which warrants review by this Court.

Respondents have already demonstrated that the affirmance of the punitive award in this case had an adequate basis in state law. However, even if one were to assume that the affirmance in this case was based upon the appellate court's rejection of OCF's due process challenge, this case does not conflict with *Dunn*.

In *Dunn*, OCF contended that the punitive award was improper under Virgin Islands' law or federal due process. *Id.* at 1385. The court in *Dunn* **rejected** OCF's due process challenge. *Id.* at 1391. Thus, even if one assumes that the district court in this case rejected OCF's due process challenge that decision is consistent with the Third Circuit's decision in *Dunn*.

OCF also claims that the personal injury suit in *Dunn* arose out of the same course of conduct as the instant case. That is not correct. Unlike *Dunn*, this case was not limited to OCF's reckless indifference in failing to warn customers about the dangers of its product in the 1960's.[55] Rather, the evidence in this case showed that in 1972 OCF unnecessarily contaminated its new asbestos free product with asbestos and "exerted maximum pressure" to sell its stockpile of old asbestos Kaylo.

All that the Third Circuit held in *Dunn* was that under the facts of that case (*i.e.*, conduct of OCF in the 1950's and 1960's) and considering the prior punitive awards against OCF for that same conduct, $1 million was the most OCF could be further punished under the law of the Virgin Islands. *Id.* at 1391. That

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55. *See Dunn* at p. 1374-76.

holding does not conflict with the affirmance of the punitive award in this case applying Florida law to different OCF conduct for which OCF has never been punished. *Dunn* fails to provide any reason for this Court to grant certiorari in this case.

III.

THE PUNITIVE JUDGMENT DOES NOT VIOLATE THE EXCESSIVE FINES CLAUSE

This Court has already resolved the question of whether the Excessive Fines Clause imposes limitations on an award of punitive damages. In *Browning-Ferris Industries of Vermont, Inc., v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), the Court confronted the question of whether the Excessive Fines Clause of the Eighth Amendment constrained a civil award of punitive damages between private parties. The Court began its analysis of this question by noting that traditionally the Eighth Amendment was perceived as applying "primarily, and perhaps exclusively" to criminal cases. *Id.* at 262. The Court declined to resolve the broader issue of whether the Excessive Fines Clause could under any circumstances apply in a civil as opposed to a criminal case. *Id.* However, the Court did hold that the Excessive Fines Clause did not constrain a civil award of punitive damages between private parties because the government had not prosecuted the action and did not receive a share of the damages. *Id.* at 264. The decision of this Court in *Browning-Ferris* was grounded upon the historical purpose of the Eighth Amendment. *Id.* In this regard, the Court explained:

> Simply put, the primary focus of the Eight Amendment was the potential for governmental abuse of its 'prosecutorial' power, not concern with the extent or purposes of civil damages.

Id. at 266. According to the Court, the history of the Excessive Fines Clause demonstrated that it was only intended to constrain "those fines directly imposed by, **and** payable to, the government." (Emphasis supplied). *Id.* at 268. The award of punitive damages in *Browning-Ferris* did not meet either of these criteria and thus did not trigger the application of the Excessive Fines Clause.

OCF now contends in this case that the Excessive Fines Clause does apply solely because Florida is entitled to share in the payment of the punitive damage award. To make this argument, OCF is forced to distort the rationale and holding of *Browning-Ferris.* OCF does this when it states:

> [T]he Court specifically reserved judgment on the issue whether the Excessive Fines Clause limits monetary punishments in the form of punitive damages either "directly imposed by" **or** "payable to" the government. *Id.* at 268.

(OCF petition at p. 13) (Emphasis added). Note what OCF has done: It has changed the quoted language of the Court from the conjunctive "and" to the disjunctive "or". This significant alteration of the Court's opinion is critical to the OCF argument because if, as the Court said, the Excessive Fines Clause only applies to a fine that is "directly imposed by **and** payable, to, the government" then it does not apply in this case. Here, the fine clearly was not "directly [or indirectly] imposed by...the government". Recognizing that the Court's use of the word "and" destroys its argument, OCF simply changes it to "or".

The Court in *Browning-Ferris* explained why the Excessive Fines Clause only applied to a fine directly imposed by the government. As noted above, the Eighth Amendment and the

Excessive Fines Clause in particular is only a constraint on the abuse by the government of its "prosecutorial" power. Where, as here, there is no exercise of the government's prosecutorial power, there is no risk or opportunity that the government will abuse that power. The mere receipt by Florida of a share of the payment of punitive damages obtained in an action prosecuted by a private litigant does not create any risk of an abuse by Florida of its prosecutorial power.

OCF also contends that the Court's decision in *Austin v. United States*, 113 S. Ct. 2801 (1993), supports its argument that this case warrants review by this Court. Again, OCF distorts the holding of *Austin* to fit its contention. In that regard, OCF claims:

> *Austin* stands for the proposition that any monetary punishment imposed by or payable to the government is subject to the limitations of the Excessive Fines Clause.

(OCF petition, p. 15) (emphasis added). Nowhere in *Austin* did the Court make any statement that would support OCF's analysis of that case. Rather, *Austin* required the Court to determine whether a civil forfeiture action brought by the government constituted a "fine" as that term is used in the Eighth Amendment. *Id.* The Court held that it was a fine and that the obvious use of the government's prosecutorial power to extract that fine was constrained by the Excessive Fines Clause. *Id.* at 2803.

The Court's discussion of *Browning-Ferris* in *Austin* underscores that the award of punitive damages in this case is not constrained by the Excessive Fines Clause. In *Austin*, the Court explained the basis of its holding in *Browning-Ferris*:

> The Court concluded that both the Eighth Amendment and §10 of the English Bill of Rights of 1689, from which it derives, were intended to prevent *the government from abusing its power to punish. . . .*

(Emphasis in original). *Austin* at 2804. This statement again emphasized that it was the exercise of the government's prosecutorial power which triggers the application of the Excessive Fines Clause. Conversely, when as here a civil action is prosecuted solely by a private citizen the Excessive Fines Clause is not applicable even if the government shares in the payment.

In summary, the question presented in this case concerning the Excessive Fines Clause was answered by this Court in *Browning-Ferris.* The Excessive Fines Clause does not apply to a civil award of punitive damages between private parties because the Excessive Fines Clause was only intended to restrain the government's prosecutorial power. This is true even if state receives a share of the award, and the only confusion concerning this issue is created by OCF's substitution of the word "or" for the Court's use of the word "and". This attempt to confuse by OCF does not warrant review of the punitive award in this case.

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A — EXCERPTED TRANSCRIPT OF PROCEEDINGS DATED MAY 16, 1995

IN THE CIRCUIT COURT OF THE THIRTEENTH
JUDICIAL CIRCUIT OF THE STATE OF FLORIDA
HILLSBOROUGH COUNTY
GENERAL CIVIL DIVISION

Case No. 93-9601
Division Z

CLARENCE DUDLEY and & GEORGIANNA DUDLEY,

Plaintiffs,

vs.

OWENS-CORNING FIBERGLAS CORPORATION,

Defendant.

TRANSCRIPT OF PROCEEDINGS

BEFORE:	HON. THOMAS MILLER Circuit Judge
TAKEN:	Courtroom 2A Hillsborough County Courthouse Tampa, Florida
DATE:	May 16, 1995
TIME:	Commencing 9:00 a.m.

Appendix A

REPORTED BY: Patty A. Starks, RPR
Deputy Official
Court Reporter
Notary Public

APPEARANCES:

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Appendix A

* * *

[9] MS. HOPPE: Your Honor, can I ask you to conform these copies for me?

THE COURT: Yes.

MS. HOPPE: Thank you.

(Pause)

THE COURT: You have the original, right?

MS. HOPPE: Yes. Thank you very much, Your Honor.

THE COURT: Okay. What is next on the agenda?

MS. VENABLE: Your Honor, we have a motion to tax costs in the Dudley case, and I do not believe that Ms. Hill has any objections to the taxable costs listed in our motion.

MS. HILL: Your Honor, that is correct.

THE COURT: Grant the motion.

MS. VENABLE: Thank you, Your Honor.

MR. VENABLE: Your Honor, next I believe is a motion for new trial in the Dudley — by Owens-Corning in the Dudley case.

THE COURT: Okay. It is the defendant's motion, right?

MS. HILL: Yes Your Honor.

[10] Katharine Hill on behalf of Owens-Corning. Your Honor, we have submitted to the Court a written motion for judgment notwithstanding the verdict or in the alternative for a new trial or in the alternative to all of those for remittitur of the award of damages.

Your Honor, I will not go through every point that is in the written motion. We would stand which by the written motion and any arguments which have been made previously to it.

The main points, though, that I might point out to the Court, first of all, of course, involves the Fabre instruction. It is the position of Owens-Corning that sufficient evidence was, in fact, presented in Mr. Dudley's case to have allowed at least his employer if not several of the other manufacturers onto the verdict form, and we believe it was error not to do so and would ask for a new trial in that regard.

The second point that I would like to bring out would be the position of Owens-Corning that reversable error was committed when a refusal of a one-day continuance was made which would have allowed [11] Owens-Corning to bring in Jerry Helzer to testify before the Court.

Mr. Helzer is an important witness for Owens-Corning because he is the only live witness who can now come and explain to a jury and testify as to certain facts, and Mr. Helzer, in fact, was present and knows these facts from his personal knowledge. Without his testimony we feel that this jury did not see a full picture of the situation, and I think that that is borne out in the excessiveness of the award of damages that was made. Mr. Helzer would have been available if we had had the continuance.

Appendix A

We also were not allowed to read testimony from previous trials that, although, Mr. Dudley was admittedly not a party to, Mr. Venable had had the opportunity to cross examine Mr. Helzer. Mr. Helzer's testimony is not case specific to the point wherefore each of any different plaintiff he is going to have something different to say or something to add. In fact, his testimony remains constant from trial to trial and, therefore, we do not believe that it would have been improper to [12] allow the reading of his prior trial testimony in lieu of his appearance in person.

Your Honor, the last point of the three that I will make oral argument on involves the issue of damages. Our first point is that Owens-Corning continues to stand by its position that punitive damages should not have been allowed to be presented to the jury. We would stand by all arguments made in our motion to strike which was filed in this case and which I have incorporated into a memorandum of law which I have supplied to counsel and filed on the idea of remittitur of punitive damages.

We believe that the jury's verdict here, Your Honor, was based on not on the facts of this case but, in fact, on sympathy and prejudice to Owens-Corning by the fact that Mr. Helzer was not allowed to testify.

Furthermore, Your Honor, the award of punitive damages is clearly excessive pursuant to Florida law. Section 768.73 states that the judgment for the total amount of punitive damages awarded to a claimant shall not exceed three times the amount of compensatory [13] damages. When the punitive damages exceed that number, the award is presumed to be excessive, and the defendant shall be entitled to a remittitur unless there was a showing of clear and convincing evidence that the award was not excessive.

Appendix A

Your Honor, I would maintain that in this case there is no evidence that is clear and convincing which would have allowed this jury to reach this number and which should negate any opportunity for remittitur in favor of the defendants.

The evidence that was presented I do not believe that there was anything any different than the evidence that has come in in cases before and before previous jurors which have ended up with no award of punitive damages. I do not believe that there was any basis for taking this award out of or placing it within the exception of the statute.

The question then becomes: What would three times the compensatory damages be? I have been provided with a draft of a judgment which would include the compensatory damages of both Mr. Dudley and his wife.

[14] It is OCF's position that Mrs. Dudley's compensatory damages cannot be included as part of the multiplier. Mrs. Dudley's action is derivative, in nature. It does not stand without her husband's action. Punitive damages cannot be awarded in the general case without an award of compensatory damages. I believe that the derivative nature of Mrs. Dudley's claim removes her from the possibility of receiving punitive damages.

In the memorandum I filed I cited two cases to that general proposition. I admit to the Court that both of these cases are pre the Tort Reform Act. I did not find a case which addressed this issue specifically now that we have a cap on punitive damages. Nonetheless, Your Honor, I believe that these cases do stand for the proposition that a derivative claim or a consortium claim should not receive punitive damages.

Appendix A

The first case that I would cite would be Moran vs. Stephens, 265 So.2nd 379. It is a 1972 Fourth DCA case. In that case, Your Honor, both husband and wife, the wife was actually the person that had received the [15] injuries, were awarded punitive damages, the husband in his derivative claim. The Court reversed the award of the punitive damages to the husband. I am sorry, Your Honor. I want to check and make sure that I did not mislead you on any points.

I believe in this case the Court simply reversed and said that it was impermissible to award punitive damages to the husband in this case. Martin vs. Story relied on Moran vs. Stephens. Martin vs. Story was a slightly different type of a case in the fact that in that case —

THE COURT: What is the cite on it?

MS. HILL: Your Honor, 97 So.2d 343. It is a 1957 Second DCA case.

THE COURT: Now wait a minute. It could not rely on Morgan —

MS. HILL: The Moran vs. Stephens relied on this particular case.

THE COURT: Oh, okay.

MS. HILL: In this case, Your Honor, punitive damages were awarded again to both husband and wife. There was a loss of consortium claim. The husband not [16] specifically requested punitive damages in his claim — in his prayer for relief. Because of the way that the jury instructions were

presented to the jury, the Court felt that the — the appellate court felt that the jury had been misled to the understanding that they could award punitive damages to both parties and, again, the court reversed on the award of the punitive damages to the husband.

Your Honor, I do not recall — I thought that I had with me the jury instructions on punitive damages. Mrs. Venable I know is very familiar with them. That jury instruction is, in fact, specific to the person. It seemed to be in my memory that it stated something to the effect that if you find in favor of Clarence Dudley you may consider the question of punitive damages.

If that is the case, Your Honor, I think that it is just another point indicating that the punitive damage award must be based on Clarence Dudley's compensatory damages and not on anyone else's and, therefore, Your Honor, that would mean that the cap in this particular case for three times the [17] compensatories to Mr. Dudley would come out to be eight million, two hundred fifty thousand dollars, and it would be that number, although Owens-Corning does not admit that punitive damages should have been awarded in this case, but if they stand it is our position that they should be reduced to that number.

THE COURT: You may respond.

MR. VENABLE: Thank you, Your Honor. First, I know that the Court has heard in some detail a lot of the evidence that the plaintiffs have put on in this and some other trials, and there was some evidence in this case that was somewhat unlike or in addition to evidence that had been introduced into previous trials against Owens-Corning, but I think that it is important especially as we address the punitive damages question to keep in mind the willful, wanton, and egregious activities of this company

because they, in fact — that activity will be one of the things that the Court must consider in the remittitur aspect of the punitive damages.

The evidence clearly showed, in fact, without I think any dispute, Your Honor, that [18] this company became aware in the early forties that its product was a dangerous product and it was a toxic product, was advised in 1956 that the asbestos by their own medical consultant could cause cancer and advertised the product in 1956 and thereafter as being non-toxic, pleasant handling and well liked workers' material.

In 1962, Your Honor, they had the opportunity to remove the amocite asbestos which they knew to be the more dangerous type of asbestos from the product which comprised at that time of approximately eighty percent of all of the asbestos in the product. This could have removed the asbestos — that eighty percent of the asbestos from the product and they did a cost analysis on it, and it cost less than a penny per pound to do that, and they elected not to do that.

In 1964 they knew that other companies had began to place warnings on their products, and yet this company despite repeatedly, despite repeatedly considering whether they should warn never once in any document that is introduced into this trial considered the [19] impact of warning or not warning on the health of workers.

They knew at the time that their product was being used by thousands and thousands of people and that they were at risk for developing terminal illness and dying, and yet repeatedly through the mid-sixties this company simply asked the question of whether or not "we ought to put a warning to protect ourselves

from lawsuits" and, in fact, Your Honor, it was on December 23rd of '66, the first day that they got sued, they put a warning on it.

In the latter part of the sixties, Your Honor, they had the opportunity to sell — in fact, in 1963 forward they had the opportunity to sell a high temperature product that contained no asbestos which they said in their own documents that evidence in this case could not be as dangerous to the workers as Kaylo was. They made profit but not a sufficient amount of profit to satisfy them on the product and, therefore, they did not sell that product and thereby knew that they were endangering thousands upon thousands of [20] workers.

In 1972, Your Honor, this case — the evidence in this case shows that even after they came to the conclusion and found a way to eliminate all asbestos from the product, to take every bit of asbestos out of the product that they had some dust that they had collected — they had dust collectors in the past, and when they would sav the old Kaylo that contained asbestos, they would collect the dust, and they would collect up to five tons of that dust a day.

Even after they got to the point that they could have removed all asbestos from the product, they refused to do so because they wanted to use up the dust that they had collected from the old Kaylo, and they went about telling the purchasers of the product that they had created a product which no longer contained asbestos as a reinforcing agent full well intending to disseminate to those workers the fact that this product was now asbestos free when they knew and had written memorandums that in this case that that product, in fact, still contained [21] asbestos because they refused to give up the dust.

Appendix A

They continued to go ahead and expose workers and endanger them long after they knew about mesothelioma and long after they knew about the fact that very small exposure to the asbestos could cause cancer and death. It is against that back drop, Your Honor, that we address the punitive damage question.

Now, this is a case which is as serious from the standpoint of what the conduct of the defendant can do as there can be, that is known to mankind. Their conduct places at risk thousands of human beings' lives and in fact has resulted in terminal illness in many, many people including the plaintiff in this case.

Statute 768.73 on punitive damages does not place a cap of three times on the amount of punitive damages. What it does is that it gives to the Court some guidance as a presumption of what would be excessive, and it simply provides that the Court can presume that three times is excessive until and unless the facts of the case show otherwise.

[22] Now, punitive damages are something that the Florida courts have long recognized is dependent upon many factors, and in fact this statute does not change one bit of that. It does not address one thing about altering those factors that are important to consider in determining whether or not an award of punitive damages is proper or excessive.

As the Florida Supreme Court noted in Wackenhut vs. Canty at 359 So.2d 430 in 1978, admittedly before this statute, Your Honor, but this statute alters nothing about the things that the Court must consider in determining whether or not there has been evidence that the award is excessive.

It says, "Punitive damages are particularly left to the

discretion of the jury as the degree of punishment to be inflicted must always be dependent on the circumstances of each case, as well as upon the demonstrated degree of malice, wantonness, oppression, or outrage found by the jury from the evidence.

"Since the degree of punishment to be inflicted upon the defendant is particularly [23] within the province of the jury, courts hold punitive damages excessive only under unusual circumstances."

Again, Your Honor, the Florida Supreme Court, Your Honor, in 1982 in Arab Termite and Pest Control vs. Jenkins at 409 So.2d 1039, again, addressed this concept of punitive damages.

"When claims for punitive damages are made, the respective provinces of the Court and jury are well defined. The Court is to decide at the close of evidence whether there is a legal basis for recovery of punitive damages shown by any interpretation of the evidence favorable to the plaintiff. Once the Court permits the issue of punitive damages to go to the jury, the jury has the discretion whether or not to award punitive damages and the amount which should awarded. Punitive damages are particularly left to the discretion of the jury as the degree of punishment to be inflicted must always be dependent on the circumstances of each case as well as upon the demonstrated degree of malice, wantonness, oppression, or outrage [24] found by the jury from the evidence."

Your Honor, I think that the following case out of the Fourth District, American Medical International, Inc., vs. Sheller, M.D., reported at 590 So.2d 947 —

THE COURT: 947?

MR. VENABLE: Yes, sir, 947. That is particularly instructive because the Court will recall, and I have case the here, but the Court is certainly more than well aware of the proposition that the amount of punishment must be in relation or the jury should consider the wealth of the defendant in determining the amount of punishment, and the cases are replete with comments to the effect that what would be punishment to a poor person or a person of limited means would be no punishment at all to a person of substantial means.

So, in 1992, Your Honor, the Fourth District was confronted with the case wherein there had been one hundred thousand dollars in compensatory damages awarded and nineteen million dollars in punitive damages had been awarded. The Court looked at that, and one of the things that they looked at was whether [25] or not this amount of damages, nineteen million dollars in punitive damages, was excessive.

One of the things that they looked at, of course, was the net worth of the defendant. They found in that case that the net worth of the defendant was one billion dollars and concluded that in that situation where you had a company that had a net worth of one billion dollars, that nineteen million dollars would not be excessive. In fact, they upheld that verdict.

Your Honor, in this case we have a tremendous — an enormous wrong that jeopardized tens of thousands of people on one hand. We have a defendant with a net worth of two billion dollars on the other hand.

The argument is made that the jury somehow because of passion, prejudice, or considering things outside of the evidence awarded an amount of punitive damages that was excessive; that

simply flies in the face of the clear and convincing evidence in the case because, Your Honor, the jury awarded in this case punitive damages less than, less than one [26] percent of the net worth of the company. A jury that was being motivated by passion or prejudice or some outside force certainly would have awarded, Judge, more than one percent against — of the net worth of the company.

This is a jury who, in fact, awarded less punitive damages than were asked for, awarded punitive damages that were less than one percent of the net worth of the company, and, therefore, Your Honor, I would submit that the evidence is clear and convincing that in this situation this award of punitive damages, admittedly a large amount of punitive damages but that this amount of punitive damages would not be excessive as a way to deter and punish this company which will clearly not bankrupt this company nor has any argument been made that they're unable to pay, but it would take an award of punitive damages of at least this amount of money to in anyway get the attention of this company and to have it respond as it should respond.

So, Your Honor, under all of the case law, the statute provides no safe harbor for [27] this defendant because the clear and convincing evidence that was produced in this courtroom shows an enormous wrong with a company with tremendous assets where we had nineteen million dollars being upheld with a company worth one billion and fifteen million dollars award with a company that has two billion. Clearly that must be taken into consideration in determining whether or not this is excessive.

The statute does not provide a cap. It simply provides for guidance for the Court and then the Court is to consider the same

type of evidence that it always considered in determining whether or not the award was excessive.

As to the other issues, Your Honor, the Fabre issue as to the employer, there was no evidence as to who Mr. Dudley's employer was, what specifically Mr. Dudley's employer did wrong, and importantly that there was no evidence, Judge, that anything that Mr. Dudley's employer did that was quote — if it was found to be, quote, negligent, there was no evidence that that negligence was a [28] legal cause of the injury to Mr. Dudley.

As we've gone over and over again, they've got to have all of the same requirements met that a plaintiff would have and clearly that was not met as to anyone including the employer.

As to the manufacturers, they violated the Dougherty case law which was decided by the Second District — I do not think that I have a copy of that with me. It was decided by the Second District.

Owens-Corning Fiberglas was a defendant in that case in fact, and the courts clearly held that if you are going to have a manufacturer appear on the verdict form that is not a party to the action, then you have to at least demonstrate that the amount of asbestos in the product, the type of asbestos in the product, none of which was done in this case as to any product that was being used in Mr. Dudley's vicinity other than Kaylo. They knew of the requirements and yet, nevertheless, they found — they chose not to put that evidence in, Your Honor, and they asked to have the manufacturers on the verdict [29] form and that's at 19 Florida Law Weekly D195.

THE COURT: I have a copy of that.

MR. VENABLE: It is as clear as a bell.

THE COURT: I have a copy of that.

MR. VENABLE: Thank you, Your Honor. They simply refused to comply with the requirements of that.

Finally, Your Honor, as to the continuance, I must admit that I am working from recollection because I do not have the transcript of that particular day yet, but I have no recollection of the attorney for Owens-Corning ever moving — moving to Your Honor that the case be recessed and continued on Monday.

I do have a recollection of counsel for Owens-Corning approaching the bench and saying, "Your Honor, I think we have a problem. We may want to call another witness on Monday."

Your Honor at that time I think explained to counsel for Owens-Corning that it was not your desire to recess the case in the middle of Friday because one juror had already [30] gotten sick, and we had been left in a situation where Owens-Corning refused to stipulate to less than six jurors deliberating, but I never recall a motion being made to Your Honor to, in fact, recess this trial and to reconvene it on Monday nor did Your Honor ever preclude counsel for Owens-Corning of completing the day on Friday and having the case starting — you know, starting back again on Monday; that was never done.

And clearly, Your Honor, the Court has the authority and the control of its own trial calendar and events which transpire in its trial.

This was a witness who was an employee of Owens-Corning

Fiberglas. They control where he goes and when he goes there. They made the argument that he is essential, he is the only witness that can come and talk about these facts. This is a company that is in tens of thousands of cases. By the evidence in this trial by Mr. Pierce, this is a company that has been sued tens of thousands of times.

Now, they have one corporate witness, [31] Your Honor, that they claim knows about the facts of these cases. Assuming that that is true, although, there is no evidence to that effect in this trial, but assuming that that is true, they're in courtrooms in fifty states, thousands of courtrooms, trials starting every other week, every week. There is a trial in Florida virtually every two or three weeks just in Florida, and they're in thousands of cases.

This company elects not to depose this witness so that they can have the deposition utilized in this case. They elect not to do that. They are told by a letter that I wrote to them a week before the trial that I will complete the plaintiff's case on Thursday morning and they will be — you know, be ready to go. I put that letter, in fact, in the court file during the trial.

So, they were told a week ahead of time precisely when they were going to get this case, and they have absolute control over this witness. They elect to send the witness, according to counsel, which I assume is true, they elect to send this witness to Texas on [32] the same day that they know that they need this witness in this courtroom.

Now, I understand that he cannot be in Texas, and he cannot be in Florida and Minnesota, and he cannot be in New Jersey, and he cannot be in Hawaii on the same day, but they knew it too, and they knew it a year ago, two years ago.

If his testimony is that essentially, then they take the deposition in the Dudley case and there is no objection that I can possibly have to reading that deposition to the jury. They chose not to do that knowing full well that they would be in conflict in numerous courts. They cannot help but be in conflict, and then to suggest that Your Honor is supposed to suspend the trial, risking mistrial by jurors' absence with a company that will not stipulate to using less than six jurors, that that is reversable error, Your Honor, there may have been an error made but it was an error in judgment of Owens-Corning not to be prepared to present their case when they knew a week ahead of time precisely when it was going to start. They knew that they [33] only had one other witness, and so they knew that they were going to run out of time to present testimony.

But more importantly, Your Honor, from a technical standpoint, I do not think that they ever asked the Court to do it. They simply talked about the possibility of doing it. Thank you, Your Honor.

I would ask for all of the reasons that have been argued at the trial as to all of the other matters that the motion for remittitur, new trial, and judgment notwithstanding the verdict be denied.

MS. HILL: Your Honor if I may briefly respond. With regard to Mr. Helzer I would like to clear up a misconception. Mr. Helzer, in fact, was in Texas before Thursday, was supposed to go on, could not get on. They were late in the trial, and they could not pull him out because he was waiting for the call to go on and that's why Thursday became a major problem in trying to get him here.

I was not present, and so I cannot say with certainly whether an actual motion was made or whether representation was made

to the [34] Court of the problem with Mr. Helzer and the fact that we could not have him here during that first week of trial, but all in all the concept was that he could have appeared on Monday. He could have testified and quite frankly, Your Honor, I think that if Mr. Helzer had been here to testify, that we may not be having the argument that we're having on the punitive damages at this point.

In regards to the punitive damages, some of the numbers and some of the information that I believe is presented and was presented to this jury would, in fact, mean that Owens-Corning has a negative net worth at this point in time. So, if we want to look at what their worth is and what an award of punitive damages should be, that number should be zero.

Furthermore, Your Honor, Mr. Venable has made a very nice argument, but he again reiterates the statement of let's make them sit up and take notice so that they can change their ways. Your Honor, this happened twenty years ago. Sitting up and taking notice, sure, this kind of money anyone sits up and takes notice of, but there is not something [35] that OCF can do. It is going beyond punishment. It is going much further than that to enter an excessive amount such as was awarded by this jury.

Furthermore, Your Honor, I take exception and I do believe that the legislature meant to put a cap on punitive damages unless there were extraordinary circumstances with clear and convincing evidence shown that a jury's award in excess of three times the compensatory damages was, in fact, a proper amount.

I do not believe that that evidence was here. I do not believe that this jury could have given this amount in punitive damages unless they were, in fact, operating from prejudice, bias, and sympathy for the plaintiff in this case. I do not believe that the

evidence is such that this — that that number can stand, and I would again state that the punitive damages at the least should be reduced to the amount that we have requested.

MR. VENABLE: Your Honor, just —

THE COURT: What about their other motion? Is it still on the docket, motion for [36] reduction of judgment based on setoff and collateral sources?

MS. HILL: Your Honor, that — we filed that formally in an abundance of caution to make sure that we had done that properly. The judgment which Mrs. Venable has provided to me, in fact, has those reductions contained within them.

On that, the only concern that I have is there are no collateral sources. I know there was testimony that went to the VA. I guess that the VA does not pay. It is not as though it is payment I had made to him. He goes in and has the procedures done. Assuming that that is correct, there would not be a collateral source reduced, although, the prior settlements have been used to reduce it.

MS. VENABLE: And, Your Honor, preparing the final judgment I assume that the Court would grant the motion for setoff and set off the amounts of prior settlements.

THE COURT: Okay. We'll go back then to this motion notwithstanding verdict.

MR. VENABLE: Yes, Your Honor. The only thing that I wanted to add is that the [37] argument — first of all, the argument that this statute places a cap on damages, it just does not do it. I mean, it is as clear as a bell.

Appendix A

It says there is a presumption and then the Court must consider the evidence and determine whether there is a reason — whether the damages are excessive — let me start over again. There is a presumption that three times the compensatory would be excessive; however, the statute specifically instructs the trial court to consider whether there is clear and convincing evidence that it is not excessive .

If we were to accept the proposition this is a cap, Your Honor, if Owens-Corning Fiberglas — let's take — I think that there was something with Metropolitan Life not long ago where they were out selling insurance policies and they were defrauding customers and let's say that it was a thousand dollars a person that they defrauded. Would the Court be virtually confined to a punitive damages award of three thousand dollars against Metropolitan Life Insurance Company, anything [38] above three thousand dollars would be excessive for fraudulent sale of insurance policies? I do not think that that's what the legislature meant and that's not what they said.

They made it clear for Your Honor and trial courts that they are to, in fact, look at the evidence and see if, in fact, there is reason to find that this was not excessive by clear and convincing evidence, and here it is clear because, Your Honor, this punitive award is less than one percent of the net worth of this company, and there was no evidence, Your Honor, not one shred of evidence introduced in this trial.

I feel for Ms. Hill somewhat. I have a great deal of respect for her. She was not here I do not think by her own choice, but Owens-Corning Fiberglas chose to have someone from out of state try this case, and unfortunately they do not choose to send the same lawyer back to this courtroom to discuss the facts.

But, in fact, they brought Mr. Pierce who was never asked a single question by [39] Owens-Corning about their net worth. I am the one that asked it. He never said that they had a net worth, never said that they had a net worth. In fact, he agreed with me that many people would perform the net worth calculation to be two billion dollars. But Ms. Hill unfortunately was not here for that not by her own fault.

The argument is also made, Your Honor, that these people are not the same people anymore and so they do not need to be punished. Well, that argument was made at length, Your Honor, ten years ago in an asbestos case before the First District in Johns-Manville Sales Corporation vs. Janssens at 463 (663) So.2d 242. Cert was denied in this case by the Florida Supreme Court.

They specifically argued, "The rationale of punishment and deterrence underlying the concept of punitive damages is absent. It argues that the persons who will bear the award are current management, directors, shareholders, employees, and customers who had nothing to do with the alleged misconduct and lack of warnings on asbestos products in the [40] 1930s, 1940s and 1950s." That is the precise argument that was rejected, Your Honor, by the First District.

In addition, Your Honor, as far as the concept of multiples — now, there has been no proof, no shred of proof in this case, not one bit of evidence in this case that Owens-Corning Fiberglas has ever paid one single dollar in punitive damages, not one dollar that they have ever actually paid out of their pocket.

They brought Mr. Pierce here, Your Honor, who had an opportunity to testify about whatever it was that they wanted him

to testify about, yet they never asked him whether or not the company had paid any punitive damages and, in fact, he testified, Your Honor, that he did not know what the money had been paid for, the money that they had, in fact, paid which I believe he testified was something in the neighborhood of eighty million dollars which sixty-one million we know went to defense costs, and he did not know how much of the other twenty million went to defense costs, and that range is what he [41] testified to, Your Honor.

The Second District Court of Appeals in 1988 in Bill Branch Chevrolet vs. Burkert at 521 So.2d 153 had the issue of this — the potential for multiple punitive damages. They state, "In considering the amount of punitive damages awarded to Burkert, this Court is aware that Bill Branch may be subject to other lawsuits stemming from the vacation promotion. Evidence of the adverse effects on Bill Branch which would be caused by the award of punitive damages in this and other pending cases was certainly admissible in avoidance or mitigation of punitive damages. Such evidence could then properly be considered by the jury in determining whether an award of punitive damages will bankrupt or destroy the defendant, but it is not a recognized basis for reversing what appears to be a large award of punitive damages to one plaintiff."

It goes on to say, "Although we believe the amount of punitive damages awarded here may be considered large, we find that reasonable men could differ as to whether the amount is so large that it should shock the [42] judicial conscience to the extent that a new trial or remittitur is required."

Here, Your Honor, the evidence, clear and convincing absolutely uncontradicted evidence in this case is that this

company went about a calculated plan which placed thousands of workers at risk of dying, that the plaintiff in this case happened to be one of those many people who is now suffering from a terminal illness because he worked with their product and that the company has a value of two billion dollars and that this jury did not even award one percent of the net worth of this company in punitive damages, and there is not one shred of evidence that this company has ever paid one dollar in punitive damages before.

For those reasons, Your Honor, that is — that is not just clear and convincing, Your Honor, but it is uncontradicted evidence in this case.

We would ask Your Honor that in that situation, the Florida Legislature never intended that companies could undertake a policy to place at risk tens of thousands of [43] people and then to be held, Your Honor, to no more than — as a bar to no more than three times compensatory when they are a multi-billion dollar, multi-national corporation.

THE COURT: I am going to deny the motion of the defendant in all respects except on punitive damages.

The ruling on punitive damages is as follows: I am going to order a remittitur by the plaintiff of six million, seven hundred fifty thousand dollars or in the alternative grant a new trial on punitive damages only. The plaintiff has the option of accepting the remittitur or going to — going to a new trial on the question of punitive damages.

I will give the plaintiff ten days to determine whether they want to accept — whether they want to accept the option or not.

In other words, the plaintiff has an option of going to trial on punitive damages alone. That is the only issue on the new trial or accepting a judgment for the eight million, two hundred fifty thousand dollars without a new trial, and the plaintiff has ten days to [44] determine whether they want to accept that option or not.

I want the plaintiff to exercise the option in writing, and upon exercising the option, then they can draw the judgment accordingly.

MR. VENABLE: Your Honor, there is — I understand Your Honor's ruling completely. I believe, as I understand it, it is acepting the number of three times —

THE COURT: Right.

MR. VENABLE: Three times the amount that Ms. Hill is suggesting.

THE COURT: Right, right.

MR. VENABLE: There is one other issue, Your Honor. I got the memorandum from Owens-Corning Fiberglas this morning and I do not — to tell you the truth, Your Honor, I had not looked at the case law, Your Honor, on the question of whether in considering the new statute, the three time multiplier, if you will, limited to the claim of Mr. Dudley in this instance.

I understand Your Honor's ruling and, in fact, it appears to me that Your Honor's [45] ruling would be three times whatever the appropriate number is, and it may very well be that Ms. Hill's number is appropriate. I just got this this morning and first

learned that it was their position that it could only be the amount of Mr. Dudley's compensatory damages, and I would just like the opportunity, Your Honor, just on that limited question, Judge, as to whether or not you may consider the total amount of punitive damages under the new statute which was not in effect.

So, I would just like — with the Court's permission if I could submit any cases that may show that that is not an appropriate response for the remittitur under this statute because it is not a matter that quite frankly I was aware that it was their position, and I have no cases on it, and it may very well be that Ms. Hill is absolutely correct, but because of the significance of what Your Honor is ruling, we would just like the opportunity if we could to address that one question by case law or memorandum if, in fact, that will — if there is anything to suggest to Your Honor because there may not be.

[46] (Pause)

MR. VENABLE: Your Honor, maybe we can do it this way. I think that this would be appropriate.

I could file a motion to reconsider the Court's order if I find any basis to challenge — I am not asking for any kind of rehearing on the Court's ruling that you are going to say that it is three times the maximum, but three times what is my only question.

I could file a motion for rehearing if there is any basis for that, I believe. I am not sure — I am trying to figure out technically if I can do that, Judge. I had not thought about it.

THE COURT: I do not — I am inclined to think that the

statute would not have any — would have no bearing on the basic law but that's the basic law.

MR. VENABLE: I believe it probably does but I want to make sure — the latest case cited to Your Honor was 1972. I know that currently, Judge, if Mr. Dudley had died, Mrs. Dudley could recover in a wrongful death [47] action punitive damages.

MS. HILL: That would be his estate and not Mrs. Dudley on her own action.

MR. VENABLE: I am not sure. I know in a wrongful death action that punitive damages can be awarded, and quite honestly, Your Honor, I have not looked at it, and the last case cited to us was 1972, and it is probably the same law, Your Honor, but because we may be dealing with four million dollars in punitive damages, I would just ask the Court's indulgence for a couple of days. I do not need long to do it.

THE COURT: Okay. The Court will give you five days to file any written memorandums concerning this matter.

MR. VENABLE: Thank you.

THE COURT: And if — and then the Court will notify you of whether or not the Court is going to change its ruling, and from my letter notifying you you will have the ten days to determine whether or not you are going to accept the option or not.

MR. VENABLE: Thank you, Your Honor.

THE COURT: All right. Any other . . .

* * *

APPENDIX B — EXHIBITS

DEFENDANT'S
EXHIBIT
OCF-270

OWENS/CORNING
FIBERGLAS **intra-company correspondence**

to C. E. Peck — T/25 from Jon L. Konzen, M.D.

date July 5, 1972

subject ASBESTOS
CAUTION
LABEL

cc: B. E. Boyd — T/27
R. S. Grant — T/25
W. L. Kreutz — T/26
J. W. Overman — T/26
L. W. Saxby — T/23
J. Vyverberg — New York
J. J. Young — T/12

The Standard for Exposure to Asbestos Dust promulgated in the Federal Register Vol. 37, No. 110, Wednesday, June 7, 1972 by the Department of Labor under the authority of OSHA of 1970 becomes effective July 7, 1972.

The Standard prescribes a specific caution label which must be affixed to all raw materials, mixtures, scrap, waste, debris and other products containing asbestos fibers or to their containers so that during any reasonably foreseeable use, handling, storage, disposal, processing or transportation, no airborne concentrations of asbestos in excess of the exposure limits prescribed.

Appendix B

At the present time the caution labels prescribed in OCF Purchase Acceptance Standards PAS.2.1.13 and PAS.2.1.43 all dated 6-14-72 do not contain the exact wording noted in the Standard. From a health warning standpoint the OCF and OSHA caution label wording are reasonably similar.

It would be wise to determine if the two labels are legally similar enough so an OCF label change is unnecessary. In the event it is determined a label change is required it may be advisable to request a variance in order to use the labeled cartons already in stock and to cover the period until asbestos is removed from Kaylo products and possibly Pyrcor Products.

The procedure to request a variance is outlined under Rules of Practice for Variances — Exemptions Under the Occupational Safety and Health Act (Code of Federal Regulations, Title 29, Chapter XVII, Part 1905, 36 F.R. 12290). Subpart B — Applications for Variances, Limitations, Variations, Tolerances, Exemptions and Other Relief, paragraph 1905.11 Variances and other relief under Section 6 (d). This information is also contained in the BNA Occupational Safety and Health Reporter, Page 41:4101.

If it is determined a variance is required it is suggested this be done through the Legal Department.

If you have any questions or comments please contact me.

JLK: mgm s/ Jon L. Konyen

Appendix B

DEFENDANT'S
EXHIBIT
OCF-260

OWENS/CORNING
FIBERGLAS **intra-company correspondence**

to J. H. Thomas - Toledo 27 from L. W. Saxby - Toledo 23

date January 31, 1972

subject cc: W. W. Boeschenstein — 27
C. E. Peck — 25

Confirming our conversation of last Thursday, here is a brief status report on high temperature insulation as you requested.

Immediate development of an asbestos-free high temperature insulation is a top priority program for the Construction Group and the Mechanical Products Division due to —

1) Accelerating trend by owners and engineers to issue insulation specifications excluding products containing asbestos.

2) New Proposed Federal Standards issued under the Occupational Safety and Health Act which will, in all probability, significantly increase the installed cost of all products containing asbestos.

In my judgment this development work must be completed in time to introduce a new asbestos-free product by January 1,

Appendix B

1973. Currently we are pursuing three different programs to solve this problem as follows:

1) We are continuing, on a priority basis, our development of a completely new and improved high temperature product (HTIS). At this time we are conducting trials at Thermo-Kenetics in Greenville, S.C. on prototype equipment which utilizes an extrusion process. This is the preferred product based upon preliminary physical and thermal test data and gross margin projections.

2) Dick Shannon is currently evaluating all asbestos-free calcium silicate products now on the market in an attempt to find a combination of fibers that will produce a satisfactory asbestos-free Kaylo product utilizing our pan pour process manufacturing equipment in Berlin.

3) J-M has verbally offered to license our new asbestos-free process. They apparently want something from OCF in return, but we do not know what that something is at the moment. The J-M development apparently uses glass fibers for reinforcement but they do not believe that their process will work in our pan pour operation.

We introduced in November a "defensive" product called Glaslag to be used where mineral wool pipe insulation has been specified. This product consists of strips of IS Board turned on end and adhered to an aluminum jacket. It is recommended for operating temperatures up to 800^0 F.

LWS/js

cc: J. P. Kern
[illegible]

Appendix B

DEFENDANT'S
EXHIBIT
OCF-261

ASBESTOS-FREE KAYLO

2/16/72

ASBESTOS-FREE HIGH-TEMPERATURE INSULATIONS

Product Name	Company Name	Mfg. Process	Curing Process	Type of Reinforcement
USA				
Kaylo	OCF	Pan-Poured	SID	TBD
		Filter Press	SID	TBD
Thermo-Bestos	JM	Filter Press	Autoclave	Unknown (Glass?)
Calsilite	GAF	Filter Press	Autoclave	Wood Fibers
Super-Caltemp	PABCO	Extrusion	Autoclave	Jute, Cotton, Glass
Careytemp	Philip Carey	Comp. Molded	Oven Dried	Glass
Thermasil	BEH	Extrusion	Autoclave	Status Unknown
English				
Newtherm G	Newalls	Filter Press	Autoclave	Cotton or Wood and Glass
Nadinsulan	—	Filter Press	Autoclave	Glass (May Contain Asbestos)
Crosfield	Crosfield	Filter Press	Oven Dried	Glass (May Contain Asbestos)

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DEFENDANT'S EXHIBIT
OCF-276

OWENS/CORNING FIBERGLAS **intra-company correspondence**

to See Distribution from G. S. Gilkey — 23

date July 31, 1972

subject Minutes of the Kaylo 10 — Asbestos Free Team Meeting July 25, 1972

cc:

The following is a chronological sequence of assignments resulting from the Team Meeting and Plant-Division meetings held on July 25-26.

Completion Date	Who	What
July 26	D. Anthony	*Complete.* Issuance of interim CAS and manufacturing specs for the non-asbestos Kaylo 10 product. These are to be in effect until the nomenclature is defined and the conversion date is effected at which time they will be updated.

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July 26 — December 1	P. Scheuerle	Finished goods inventories of asbestos containing products to be balanced for easy phase out after December 1, 1972.
July 26 — December 1	D. Glosser	Exert maximum pressure to move the current slow moving inventories of Kaylo products out of the Berlin Plant.
July 31	L. Saxby	Letter to F. Wilson for development of a test method to determine during production that the finished material will withstand normal shipping abuse and be received in acceptable condition.
August 1	D. Glosser	*Notification* to P&P, MPD sales, CSC, Berlin of test marketing program — 8 specific customers for job follow (inspection report to be circulated to team members) and beginning 8/7, K10-AF, may be included in *any* shipment. Product ID, invoice insert, etc., to be spelled out.

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DEFENDANT'S EXHIBIT
OCF-277

J.J. Doherty — 15

D. D. Mast — 26

July 31, 1972

KAYLO 10 (AF)
KAYLO 10 (ASBESTOS FREE)

J. B. Carrington — 23
R. C. Glosser — 23
P. T. Saverstrom — 23
J. W. Overman — 26

KAYLO 10 has been used as a trademark for many years. I discussed the use of the words "asbestos free" with Mr. Glosser and was assured that these words will not be used on KAYLO 10 labels prior to the time that all asbestos (including that in offware additions to the batch) is removed from the product.

If the letters "AF" are used on KAYLO 10 labels in an interim period, care must be exhibited to avoid misleading customers into believing that all asbestos has been removed when, in fact, it has not been removed from offware added to the batch.

s/ Daniel B. Mast
Daniel B. Mast
Law Department

DDM: mm

Appendix B

DEFENDANT'S
EXHIBIT
OCF-50.1

THE MANUFACTURE OF KAYLO PRODUCTS

by

W. C. Taylor

June 10, 1959

DISTRIBUTION RESTRICTED TO:

Mr. E. S. Adams — Toledo
Dr. L. P. Biefeld — Toledo
Mr. B. E. Boyd — Toledo
Mr. J. M. Briley — Toledo
Mr. P. B. Brown — Newark
Mr. F. R. Coumbe — Kansas City
Mr. R. S. Grant — Toledo
Mr. C. V. Handel — Toledo
Mr. L. R. Kessler — Toledo
Mr. R. J. Paoletti — Barrington
Mr. A. J. Pearson — Newark
Mr. O. W. Pfeifer — Berlin
Mr. W. K. Sidwell — Toledo (6)
Dr. A. C. Sifert — Newark
Mr. A. L. Simison — Toledo
Mr. H. V. Smith — Toledo
Mr. C. A. Smucker — Newark
Mr. G. C. Stefango — Toledo
Dr. W. C. Taylor — Toledo
Mr. E. J. Walker — Toledo
Mr. P. L. Welsh — Newark

Appendix B

The entire batch mixing facilities should be the object of study and comprehensive planning in view of the greatly increased demands for production. Present batch mixing facilities are essentially the same as those that first went into operation on March 12, 1954. More than twice as much slurry per day is being mixed now than it was then. The ultimate capacity of the system under the most efficient operation was considered at that time to be about 32 batches per day of the same type of slurry. Not only has this "limit" been exceeded, but the plant has been called upon on certain days to mix three types of slurries instead of only one.

The exact manner in which waste Kaylo products will be returned to the raw batch has not been determined as yet. Nor is it known how much of the material presently sent to the dump can be safely incorporated in the batch.

The quantity of dust that results from the trimming, routing, and planing operations far exceeds the weight of the reject ware. This Kaylo dust is collected in dust arrestors, and usually amounts to more than 5 tons per day, or nearly 15% of the weight of the solids that go into the Kaylo-10 thermal insulation batches daily.

Laboratory results thus far indicate that it is likely that this much can be returned to the raw batch without serious degradation of the quality of the product. In utilization on a plant scale, this dust will probably be transferred from the collectors to a tank where it will be mixed with water at a definite water/solids ratio. Plans call for two such tanks. During any one day, the dust and water will be mixed in one tank, and the dust-water slurry prepared the previous day drawn off from the other as needed in the batching operation.

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DEFENDANT'S
EXHIBIT
OCF-261

ASBESTOS-FREE KAYLO

2/16/72

ASBESTOS-FREE PAN-POURED BATCH

COMPOSITION OF CURRENT PRODUCTION ASBESTOS CONTAINING PAN-POURED BATCH

MATERIAL	LBS./BATCH	% WT.
W-3 ASBESTOS	220	6.90
S-33 ASBESTOS	55	1.73
7D ASBESTOS	200	6.27
TOTAL ASB.	(475)	(14.90)
LIME	360	11.29
DE	480	15.06
SILICA	310	9.72
CEMENT	752	23.59
CLAY	100	3.14
LIMESTONE	160	5.02
CHROMITE	75	2.35
DUST	376	11.79
SODIUM SILICATE	100	3.14
TOTAL	3188	100.00

COMPOSITION OF BEST ASBESTOS-FREE PAN-POURED BATCH DEVELOPED TO-DATE

MATERIAL	LBS./BATCH	% WT.
GLASS	120	3.97
LIME	589	19.50
DE	456	15.09
SILICA	475	15.72
CEMENT	488	16.15
BENTONITE	238	7.88
DUST	569	18.83
SODIUM SILICATE	86	2.85
TOTAL	3021	99.99

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DEFENDANT'S
EXHIBIT
OCF-274 WITH ATTACHMENTS

D. Glossar — 23 Tower

H. V. Smith — 11 Tower

July 26, 1972

KAYLO 10 AF

L. Saxby — 23 Tower
A. J. Pearson — 25 Tower
P. Scheuerle — Berlin

Attached is a copy of a rough draft of the two memorandums we discussed in the Kaylo Team meeting on July 25. They are offered to help you get these prepared for use with the Branch and the customers at the earliest possible date.

Only one point in the draft is considered critical. Until we are entirely on the new product and have cleaned our process system of all traces of asbestos we should avoid the statement of "asbestos free". I believe that we are honest in stating that no asbestos has been used as a reinforcement agent.

It is suggested that you review your final draft with the Legal Department prior to issue so as to make certain that our claims, either by direct statement or by inference, are legitimate.

s/ H. V. Smith
H. V. Smith

HVS: rib
Attachments

Appendix B

NOTICE

Included in the shipment covered by the attached invoice is a quantity of the new Kaylo 10 Asbestos-Free product, which has been produced without employing asbestos as a reinforcement material. Its properties are of the same order as the standard K-10. If you have any comments relative to the material, please advise the local OCF sales representative immediately.

You are aware of the need for a calcium silicate product which does not use asbestos for reinforcement, yet which retains the same beneficial properties which have been provided by Kaylo-10 pipe and block insulation. The Kaylo 10AF material, we believe, fits this need.

In order to initiate a change over to the new product, it is necessary, for a period of time, that we inter-mix Kaylo-10 and Kaylo 10AF on many shipments. We will keep you advised of mixed shipments by means of this memo being attached to invoices where intermixing has occurred. Your cooperation and comments will be greatly appreciated.

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PLAINTIFF'S
EXHIBIT
4315.0

Produced *in camera* under seal by order of Judges Paul Riley and Gordon [illegible]. October 16, 1969, in *[illegible]*, et al. 67-L1236

Steve Mayer — T/26

Jon L. Konzen, M.D.

August 29, 1972

ASBESTOS-FREE KAYLO

Owens-Corning Fiberglas Corporation has for many years marketed under the trademark KAYLO a calcium silicate asbestos containing high temperature product. During the manufacture and installation of KAYLO products, airborne concentrations of asbestos containing dust are generated. Because asbestos is known to cause a fibrosis of the lung called asbestosis, carcinoma of the lung tissue and malignant mesothelioma of the covering or pleura of the lung extensive, stringent and costly engineering controls and medical monitoring of exposed employees has been necessary.

In areas where engineering controls were not feasible, either in the plant or at the site of application, it has been necessary to wear protective respiratory equipment. Respirators are a poor second choice for protection of the worker.

Largely for reasons of health of exposed workers, asbestos-free

Appendix B

KAYLO has been developed. The asbestos has been replaced with fibrous glass. To date, observation of workers — some of whom have been exposed for over thirty years — has not demonstrated chronic, adverse pulmonary effects from exposure to fibrous glass. From a medical standpoint, fibrous glass is an excellent substitute for asbestos in the KAYLO product.

If you have any questions or comments concerning the above statement would you please contact me.

JLK:mgm